No. 76-229

IN THE

# Supreme Court of the United States

October Term 1976

T. S. ALPHIN AND ALPHIN AIRCRAFT, INC.,
*Petitioners,*

*vs.*

RICHARD HENSON AND HENSON AIRCRAFT, INC.,
*Respondents.*

## SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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T.S. Alphin and Alphin Aircraft, Inc. hereby respectfully supplement their petition for the issuance of a writ of certiorari to the United States Court of Appeals for the Fourth Circuit as follows:

On September 30, 1976, the President signed Public Law 94-435, known as the "Hart-Scott-Rodino Antitrust Improvements Act of 1976."

Section 302 of this Act provides in pertinent part:

The Clayton Act (15 U.S.C. 12 et. seq.) is amended

* * *

(3) by adding at the end of section 16 (15 U.S.C. 26) the following: 'In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.'

The enactment of this statute requires the award of the cost of suit, including a reasonable attorney's fee, to Alphin in this case, and is therefore dispositive of the issues raised in the pending petition for certiorari. Consequently, we bring this new law to the attention of the Court and respectfully request the Court to grant our petition for certiorari and to remand this case to the Court of Appeals for further proceedings consistent with the new law.

The plaintiff, Alphin, clearly "substantially prevailed" in the action below. The District Court found that the defendants had violated section 2 of the Sherman Act by attempting to monopolize aviation business activities in the market in which Alphin sought to compete. Under section 16 of the Clayton Act the District Court issued an injunction restraining and enjoining the defendants from attempting to monopolize any part of the business they, or either of them, conducted on the Hagerstown Regional Airport by various stipulated means "or in any other way that would violate §2 of the Sherman Act."

Since section 16 of the Clayton Act did not then require the payment of an attorney's fee to a prevailing plaintiff, Alphin applied for an attorney's fee under section 4 of the Clayton Act or, alternatively, under the "bad faith-oppressive conduct" exception to the "American Rule" (that each party bear the cost of his own attorney), which was recognized by this Court in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 258-59 (1975). The District Court and the United States



Court of Appeals for the Fourth Circuit denied Alphin an attorney's fee on those grounds, ruling that "no attorney's fee may be allowed a plaintiff who obtains an injunction but no damages in a case brought under the antitrust laws." As developed in our Petition for Certiorari, we feel that these important questions were wrongly decided below and should be reviewed by this Court. However, since no final determination or judgment has yet issued in this case (the issuance of the mandate of the Court of Appeals was stayed pending the outcome of proceedings in this Court), the instant case is a matter which was still pending on September 30, 1976 (the date of enactment of the new legislation) and therefore that statute controls the disposition of this case. As this Court held in *Bradley* v. *School Board of the City of Richmond*, 416 U.S. 696 (1974), "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is a statutory direction or legislative history to the contrary." 416 U.S. at 711.

Indeed, the legislative history of the new law—as well as the language of the law itself—indicates that the statute is to be applied to pending cases such as ours, a conclusion that was reached in *Bradley* only by application of the general rule to that effect. First, section 304 of P.L. 94-435 provides expressly that the amendments to the Clayton Act made by section 301 of P.L. 94-435 (relating to *parens patriae* actions by State Attorneys General) "shall not apply to any injury sustained prior to the date of enactment of this Act." Since Congress expressly negated the application of the attorney's fee amendment to pending *parens patriae* actions, it is a fair inference, consistent with rules of statutory construction, that Congress intended other provisions of the Act to apply to pending actions, consistent with established law. Indeed, Congress' intent that the provision for attorney's fees in Clayton Act section 16 cases should apply to pending cases was specifically and expressly manifested in the legislative history. Senator Hart, the moving force behind the legislation, was asked on the floor of the

Senate a question for the purpose of establishing a legislative history "with respect to the effective date of attorney's fees." Senator Hart confirmed that, following the rule of this Court in *Bradley* v. *School Board of the City of Richmond,* 416 U.S. 696 (1974), "actions brought prior to the date of enactment of this provision, yet decided after the date of enactment, will still be eligible for such attorney's fees awards."

> "Mr. Abourezk. Five minutes. Can I, before the Senator does that, do this? I want to establish some legislative history, and I have a question to ask of Senator Hart on section 304 with respect to the effective date of attorney's fees.
>
> I note that section 304 of the bill provides for payment of expenses and attorneys' fees of plaintiffs who substantially prevail in an action under 15 U.S.C. 2. I also note that pursuant to section 306(d), the effective date of this provision shall be the date of enactment of this bill.
>
> Does this mean that following the usual rule, as in such cases as *Bradley* v. *School Board of the City of Richmond,* 416 U.S. 696 (1974), actions brought prior to the date of enactment of this provision, yet decided after the date of enactment, will still be eligible for such attorneys' fees awards?
>
> Mr. Philip A. Hart. The answer is "yes," under that case and a number of other comparable cases.
>
> Cong. Rec. S 8960 (daily ed. June 10, 1976) (94th Cong., 2d Sess.)[1]

[1] The "Section 304" referred to in the foregoing exchange (of the Senate Bill, S. 1284) became section 302 in the final Act and section 306(d) referred to in the floor exchange was dropped from the final Act. The absence of section 306(d) (providing that the effective date of the Act is the date of enactment), has no substantive effect since the effective date of the Act is always the date of signature by the President unless otherwise specified, *Gardner* v. *Collector,* 6 Wall (73 U.S.) 499 (1868).



With this legislative history, there is no question that the provision for attorney's fees in Clayton Act section 16 cases was intended to apply to all pending matters. Indeed, similar to the situation in *Bradley,* Alphin has here vindicated an important public policy and there is, therefore, no manifest injustice in applying the new law in the manner intended by Congress.[2] Nor are there any rights which have matured or have become unconditional in this action which might give rise to a complaint of injustice by the application of this change in the law to this pending case.

[2] The Senate Judiciary Committee Report on the Senate Bill said:

> The antitrust laws clearly reflect the national policy of encouraging private parties (whether consumers, businesses, or possible competitors) to help enforce the antitrust laws in order to protect competition through compensation of antitrust victims, through punishment of antitrust violators, and through deterrence of antitrust violations. Litigation by "private attorneys general" for monetary relief and for injunctive relief has frequently proved to be an effective enforcement tool. In *Alyeska,* the Supreme Court noted that:
>
> > It is true that under some, if not most, of the statutes providing for the allowance of reasonable fees, Congress has opted to rely heavily on private enforcement to implement public policy and to allow counsel fees so as to encourage private litigation. Fee shifting in connection with treble-damage awards under the antitrust laws is a prime example.
>
> Section 304 is the Congressional response to the invitation of the Court to enact specific legislation authorizing the award of attorneys' fees when there is a strong public policy to be vindicated.
>
> S. Rep. No. 94-803, 94th Cong. 2nd Sess., 38 (1976)

WHEREFORE, for the foregoing reasons, as well as those already presented in our Petition for Certiorari, Alphin respectfully requests this Court to grant its petition for a writ of certiorari and to direct that a reasonable attorney's fee be awarded to Alphin in connection with the prosecution and appeal of this case.

Respectfully submitted,

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